

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS LOPEZ,	§
	§ No. 528, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0506007270
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 18, 2009

Decided: January 26, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

**ORDER**

This 26<sup>th</sup> day of January 2010, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Carlos Lopez, filed an appeal from the Superior Court's August 25, 2009 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we affirm.

(2) In February 2006, Lopez was found guilty by a Superior Court jury of one count of Rape in the Second Degree. He was sentenced as a

habitual offender to life imprisonment. Lopez' conviction was affirmed by this Court on direct appeal.<sup>1</sup>

(3) In this appeal from the Superior Court's denial of his second motion for postconviction relief, Lopez claims that the Superior Court erred and abused its discretion by ruling that his motion was time-barred<sup>2</sup> and procedurally barred as formerly adjudicated.<sup>3</sup> Lopez contends that, due to the violation of his constitutional right to confront his accuser at trial, his motion, albeit untimely, should have been considered on its merits under the interest of justice exceptions of Rule 61.<sup>4</sup>

(4) Before addressing the merits of a postconviction motion pursuant to Rule 61, the Superior Court must first address the procedural requirements of the rule.<sup>5</sup> Lopez does not dispute that his current claim is time-barred and procedurally barred under Rule 61. Nor does he dispute that both the victim of the crime and her friend, who was an eyewitness to the crime, testified at his trial. Rather, Lopez argues that the time and procedural bars are inapplicable because a testimonial out-of-court statement

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<sup>1</sup> *Lopez v. State*, Del. Supr., No. 234, 2006, Holland, J. (Dec. 22, 2006).

<sup>2</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>3</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>4</sup> Super. Ct. Crim. R. 61(i)(4) and (5).

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

by a non-testifying witness named Joey Torres was improperly admitted into evidence at his trial.<sup>6</sup>

(5) Unlike the *Crawford* case cited by Lopez, however, the out-of-court statement at issue here was introduced into evidence by Lopez' own attorney and, for reasons of trial strategy, was introduced without calling Joey Torres as a live witness. As discussed in the Superior Court's February 29, 2008 order denying Lopez' first postconviction motion, defense counsel's strategy was to use the out-of-court statement to suggest to the jury that Torres, and not Lopez, was involved in the sexual act with the victim. Moreover, Lopez actually benefitted from Torres' absence from the trial, since his attorney was able to utilize Torres' statement for his own purposes, without the risk of being contradicted by Torres' live testimony. Because the *Crawford* case is factually inapposite to the issue presented here and Lopez has demonstrated no legal or factual support for overcoming the procedural bars, we conclude that the Superior Court's judgment must be affirmed.

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<sup>6</sup> Lopez cites the case of *Crawford v. Washington*, 541 U.S. 36 (2004) in support of his argument. In *Crawford*, the United States Supreme Court ruled that the introduction of an out-of-court statement by a non-testifying prosecution witness violated the defendant's constitutional rights under the Confrontation Clause.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice